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No. ____

In The
Supreme Court of the United States

AZZAM AHMED,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Ohio Court of Appeals for the Eighth Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the elimination by judicial decision of presumptions in favor of minimum sentences and against maximum or consecutive sentences as applied to a defendant convicted of crimes which allegedly occurred prior to the judicial decision, resulting in imposition of maximum, and consecutive sentences, violates the proscription against *ex post facto* laws and the Due Process Clause of the Fourteenth Amendment.

Whether the failure of appellate counsel to raise clear constitutional errors on appeal, which would have resulted in the reversal and vacation of defendant's maximum, consecutive sentences, violates the defendant's Sixth Amendment right to the effective assistance of counsel.

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Petitioner Azzam Ahmed respectfully prays that a Writ of Certioriari issue to review the decision of the Ohio Court of Appeals for the Eighth Judicial District entered on June 11, 2007.

OPINIONS BELOW

The Ohio Court of Appeals for the Eighth Judicial District announced its decision in this case on May 31, 2007, and issued an unpublished opinion on June 11, 2007. A copy of that opinion is attached as Appendix B. The Ohio Supreme Court issued a one-page order denying discretionary review of the Court of Appeals' decision on October 31, 2007. A copy of that order is attached as Appendix A.

JURISDICTION

The Ohio Supreme Court denied discretionary review on October 31, 2007. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . and to have the assistance of counsel for his defense."

Article I, Section 10 of the United States Constitution provides in relevant part: "No bill of attainder or ex post facto Law shall be passed."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

B. State Statutory Provisions:

Ohio Revised Code Section 2929.14(A) provides in relevant part:

> "(A) . . . if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:
>
> "(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.
>
> "(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years."

Ohio Revised Code Section 2929.14(B) provides in relevant part:

> "(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (G), or (L) of this section, in section 2907.02 or 2907.05 of the Revised Code, or in Chapter 2925. of the

Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

"(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

"(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

Ohio Revised Code Section 2929.14(C) provides in relevant part:

"(C) Except as provided in division (G) or (L) of this section or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section."

Ohio Revised Code Section 2929.14(C)(4) provides in relevant part:

> "(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> "(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> "(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> "(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

C. Other pertinent statutes

Relevant Ohio sentencing statutes, which are attached as Appendix C, include the following:

Ohio R.C. §2907.02 - Rape
Ohio R.C. §2907.03 - Sexual Battery
Ohio R.C. §2907.06 - Sexual Imposition

STATEMENT OF THE CASE

On August 29, 2002, the defendant, Dr. Azzam Ahmed, a 55-year gynecologist, was charged with sexual misconduct with a patient. The arrest was televised and accorded great local publicity, and the Parma, Ohio, Police Department provided a telephone number to call for other patients who believed they might have been similarly treated. The result was a secret indictment issued on May 20, 2003, charging Dr. Ahmed with fifty-three offenses involving thirty-seven patients: twenty-seven counts of sexual imposition, a third-degree misdemeanor, twenty-four counts of sexual battery, a third-degree felony, and two counts of rape, a first-degree felony.

The case proceeded to trial in January of 2004. The prosecution dismissed three counts of sexual imposition during trial. The jury ultimately acquitted Dr. Ahmed of thirty of the remaining fifty counts, rendering not guilty verdicts on thirteen of the twenty-four counts of sexual imposition, and seventeen of the twenty-four counts of sexual battery. It convicted him of eleven sexual imposition counts, seven sexual battery counts, and of the two rape counts, which involved a single patient, based on a theory that her

capacity was diminished. That patient testified for the prosecution in its case-in-chief, but returned to the stand as a witness for the defense, and recanted her testimony.

At the time of the trial, and at the time Dr. Ahmed allegedly committed the crimes, Ohio employed a "presumptive" sentencing scheme: rather than giving a judge unfettered discretion to impose a sentence within the statutory range, the statutes required a trial court to make certain findings before giving a defendant a non-minimum, or a maximum or consecutive sentence. A first offender such as Dr. Ahmed was presumptively entitled to a minimum, concurrent sentence of three years. Instead, the trial court imposed maximum sentences on each of the offenses (two of the sexual battery convictions merged with the two rape convictions), and ordered the sentences to be served consecutively, for a total sentence of forty-five years.

Upon appeal, the court of appeals affirmed the convictions, but vacated the sentences, holding that the findings made by the trial judge were not sufficient to overcome the presumption against maximum or consecutive sentences, and remanded the matter for resentencing. It should be noted that this was not a case of the appellate court determining that the trial judge had failed to make any findings; rather, the appellate court determined that the findings the trial judge *did* make were legally insufficient to support maximum or consecutive sentences.

Prior to Dr. Ahmed's resentencing, the Ohio Supreme Court issued its decision in ***State v. Foster***,

109 O.St.3d 1 (2006). The court held there that the judicial findings required by the statutes in order to impose more than minimum, maximum, or consecutive sentences constituted judicial fact-finding in derogation of a defendant's Sixth Amendment right to a jury trial, as explained in this Court's ruling in ***Blakely v. Washington***, 542 U.S. 296 (2004). As a remedy, the court severed the portions of the statute requiring those judicial findings.

The result was that a judge no longer had to make *any* findings in order to impose more than minimum, maximum, or consecutive sentences. At Dr. Ahmed's resentencing, that is precisely what occurred: the trial judge again imposed maximum, consecutive sentences.

Appeal was once more taken to the court of appeals, which affirmed the sentences in an unpublished opinion announced on May 31, 2007, and journalized on June 11, 2007. Dr. Ahmed then retained new appellate counsel, who filed an appeal to the Ohio Supreme Court, alleging, *inter alia*, that the application of ***Foster*** to crimes allegedly committed prior to the decision constituted a violation of defendant's due process rights against *ex post facto* judicial rulings, and that the failure of prior appellate counsel to raise that issue in the court below constituted ineffective assistance. The Ohio Supreme Court denied discretionary review. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING WRIT

I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER THE RETROACTIVE APPLICATION BY JUDICIAL DECISION OF THE ELIMINATION OF PRESUMPTIONS IN FAVOR OF MINIMUM SENTENCES, AND AGAINST MAXIMUM OR CONSECUTIVE SENTENCES, TO A DEFENDANT CONVICTED OF OFFENSES ALLEGEDLY COMMITTED PRIOR TO THE DECISION, VIOLATES A DEFENDANT'S DUE PROCESS RIGHTS AGAINST EX POST FACTO JUDICIAL DECISION-MAKING.

It is difficult to understate the effect of this Court's decision in ***Blakely v. Washington***, 542 U.S. 296 (2004) upon state sentencing laws. Many, such as Ohio's, provided for "presumptive" sentences, under which a defendant faced either an exact sentence or a sentence within a specific range, and the sentencing court was required to impose that sentence unless it found certain facts sufficient to override the presumption for the specified sentence. This Court's subsequent decisions, such as ***Cunningham v. California***, 127 S.Ct. 856 (2007) make clear what the Ohio Supreme Court acknowledged about Ohio's sentencing scheme in ***State v. Foster***, 109 O.St.3d 1 (2006): that a system of presumptive sentencing which depended upon judicial fact-finding to override those presumptions could not survive ***Blakely***.

Certiorari should be granted by this Court to resolve the question precisely raised by this case: whether the *ex post facto* application of ***Foster's***

remedy – essentially, abolishing those presumptions and allowing a trial court unfettered discretion in imposing more than minimum, maximum, and consecutive sentences – violates the rights of a defendant convicted of crimes which allegedly occurred prior to ***Foster***. While the immediate focus of the Court's review would be on Ohio's sentencing laws, as noted, a decision would provide clarity to other states which employed the same type of presumptive sentencing scheme.

At the outset, it is important to understand the Ohio system in effect at the time Dr. Ahmed allegedly committed his crimes in 2001 and 2002. At that time, as now, the statutory penalty for first-degree felonies such as rape was a sentence of from three to ten years, in yearly increments. The statutory penalty for third-degree felonies such as sexual battery was a sentence of one to five years, again in yearly increments.

A trial judge, however, was not free to impose a penalty anywhere within that range. If the defendant had never served a prison term before (Dr. Ahmed had never been charged, let alone convicted, of a crime before this), the judge had to make certain findings in order to impose more than the minimum sentence: that a minimum sentence "would demean the seriousness of the crime" or "would not adequately protect the public." Similarly, the judge also had to make certain findings in order to impose a maximum sentence: that the defendant had "committed the worst form[] of the offense" and that the defendant "pose[d] the greatest likelihood of committing future crimes." Moreover, before imposing consecutive sentences, the trial judge had to make additional

findings, such as that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct" and that "[a]t least two of the multiple offenses were committed as part of one or more courses of conduct."

In ***Blakely***, this Court established that

> "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." 542 U.S. at 303-304. (Emphasis in original).

Under ***Blakely***, then, at the time he allegedly committed his crimes, the maximum penalty Dr. Ahmed faced – the maximum penalty which could be imposed upon him without the trial court making any additional findings – was a minimum, concurrent sentence of three years. Any sentence beyond the minimum, let alone maximum or consecutive sentences, required judicial fact-finding that was barred by ***Blakely***.

The Ohio Supreme Court recognized this in ***Foster***, and as a remedy simply excised the portions of the sentencing statutes which required fact-finding, resulting in the elimination of the presumptions in favor of minimum sentences and against maximum and consecutive sentences. Thus, at the time Dr.

Ahmed was resentenced in 2006, he no longer could claim the benefit of the presumptions which had been in effect at the time he allegedly committed the crimes for which he was convicted.

Dr. Ahmed contends that the retroactive application of ***Foster*** to him, in the elimination of sentencing presumptions to which he was otherwise entitled, constitutes a violation of his rights to due process.

The underlying principle against retroactive application of the criminal laws is contained in Article I, Section 10 of the Constitution: "No. . . ex post facto Law shall be passed." In ***Calder v. Bull***, 3 U.S. (Dall.) 386, 390 (1798), this Court defined the four types of laws which would run afoul of that prohibition. The one pertinent to this case is the third:

> "Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."

As a result of the Ohio Supreme Court's decision in ***Foster***, and its elimination of the presumptive sentences to which Dr. Ahmed was entitled, he was subjected to substantially greater punishment than at the time he allegedly committed his crimes.

Dr. Ahmed's situation in this respect is similar to that of the defendant in this Court's decision in ***Miller v. Florida*** 482 U.S. 423 (1987). The State of Florida had enacted a comprehensive sentencing scheme which specified range of presumptive sentences for each offense. At the time the defendant committed his

crime of sexual battery, the statutes provided a presumptive sentence of 3½ to 4½ years. By the time he was convicted and sentenced, however, the presumptive sentence had been increased to 5½ to 7½ years. The Florida Supreme Court upheld the trial court's imposition of the new sentence, holding that there was no *ex post facto* violation because "the presumptive sentence established by the guidelines does not change the statutory limits of the sentence imposed for a particular offense." ***State v. Jackson***, 478 So. 2d 1054, 1056 (Fla. 1985).

On appeal to the U.S. Supreme Court, this Court first determined that

> "to fall within the ex post facto prohibition, two critical elements must be present: first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" 482 U.S. at 430.

The Court unanimously concluded that defendant met both those criteria. The change in the law had obviously been applied retroactively, and there was no difficulty in concluding that the change in the sentencing scheme "disadvantaged" the defendant: it increased his presumptive sentence by two to three years.

The same argument applies here: Dr. Ahmed was entitled to a presumptive sentence of minimum, concurrent terms, and the ***Foster*** decision's elimination of that entitlement operated retrospectively to his disadvantage.

The Florida change resulted from legislative action, while ***Foster*** was of course a judicial decision. The Ohio Supreme Court's ruling in ***Foster*** does not directly implicate the *Ex Post Facto* Clause, since that provision is a only a limitation upon the powers of the legislature, not the judicial branch. ***Marks v. United States***, 430 U.S. 188, 191 (1977).

This Court has held, however, that the retroactive application of a judicial decision may be similarly prohibited because of due process considerations. In striking down the retroactive application of an interpretation of a criminal statute by the state's highest court, this Court ruled in ***Bouie v. Columbia***, 378 U.S. 347 (1964),

> "The Due Process Clause compels the same result. . . where the State has sought to achieve precisely the same effect by judicial construction of the statute. While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal." 378 U.S. at 362.

The protections afforded by due process considerations against the retroactive application of judicial decisions are not necessarily co-extensive with the protections of the *Ex Post Facto* Clause against the retroactive application of criminal statutes. The distinction in those protections was defined by this Court in ***Rogers v. Tennessee***, 532 U.S. at 451, 462 (2001), in which this Court stated,

> "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" (Quoting ***Bouie***, 378 U.S. at 354).

Thus, the proper focus is on the warning and notice a defendant has in the possibility of a judicial decision retroactively enhancing the criminality of his conduct or the penalty to be imposed for it. ***United States v. Lanier***, 520 U.S. 259, 266 (1997) ("Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.")

Had Dr. Ahmed's alleged crimes been committed after ***Blakely*** was decided, a legitimate argument might be advanced that ***Blakely*** gave just such notice. The 6th Circuit concluded as much with regard to an argument on the retroactive application of ***Booker v. United States***, 543 U.S. 220 (2005):

> "While it is true that precisely what effect Blakely would have on the Guidelines was not known, *Blakely* was decided before defendant committed the robberies here. Thus, it would not have been a leap of logic to expect the Supreme Court to apply *Blakely* to the Guidelines in some manner." ***United States v. Barton***, 455 F.3d 649, 653-654 (6th Cir. 2006).

There can be no such argument here, however; Dr. Ahmed's alleged crimes occurred several years before ***Blakely*** was decided, and while this Court's earlier decisions in ***Apprendi*** and ***Ring*** served as the groundwork for ***Blakely***, it would be difficult to argue that more than a few legal scholars anticipated the ***Blakely*** decision, let alone that the average individual had "fair warning" of it.

Moreover, the change wrought by ***Foster*** specifically impacted Dr. Ahmed. As noted, his original sentence was vacated not because the judge failed to make any findings justifying a maximum, consecutive sentences, but because the findings the trial judge *did* make didn't warrant maximum, consecutive sentences. Had it not been for the ***Foster*** decision, it is quite possible that the trial judge would have been bound to give Dr. Ahmed no worse than non-maximum, concurrent sentences. Because of ***Foster***, the trial court gained unfettered discretion to sentence Dr. Ahmed to maximum, consecutive sentences of 45 years.[1]

In summary, due process mandates that a judicial decision nullifying the presumptive sentences contained in Ohio's statutes cannot be retroactively applied to Dr. Ahmed so as to deny him of the benefit of those statutes. The Ohio Supreme Court's retroactive elimination of the presumptive sentencing

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[1] Ohio law does not provide for parole or any other method of early release for someone sentenced to more than ten years in prison. Dr. Ahmed's scheduled release date from prison is February of 2049, when he will be 102 years old.

in ***Foster*** disadvantaged Dr. Ahmed in the same fashion that the South Carolina Supreme Court's retroactive expansion of the criminal trespass statute disadvantaged the defendants in that case.

II. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER APPELLATE COUNSEL IS INEFFECTIVE FOR FAILING TO RAISE SENTENCING ERRORS ON APPEAL WHEN THE FAILURE TO PROPERLY PRESERVE THE ISSUE RESULTS IN THE AFFIRMANCE OF THE MAXIMUM POSSIBLE SENTENCE.

As noted, prior appellate counsel did not raise the due process violation inherent in the retroactive application of ***Foster*** to Dr. Ahmed's case. That issue was raised for the first time by present appellate counsel, in the Memorandum in Support of Jurisdiction seeking discretionary review by the Ohio Supreme Court, which was denied. Ordinarily, the failure to raise an issue on appeal in the lower court constitutes a waiver of that issue on further appeal.

The failure to raise the issue below does not constitute a waiver, however, where prior appellate counsel was ineffective in failing to raise it.[2] The test for ineffective assistance of counsel enunciated by this Court in ***Strickland v. Washington***, 466 U.S. 668

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[2] Present appellate counsel also asserted the issue of the ineffective assistance of prior appellate counsel, in their failure to raise the due process issue, in the aforementioned Memorandum in Support of Jurisdiction seeking discretionary review by the Ohio Supreme Court.

(1984) also pertains to appellate counsel. ***Roe v. Flores-Ortega***, 528 U.S. 470 (2000).

This does not impose upon appellate counsel a duty to raise *all* non-frivolous assignments of error. ***Jones v. Barnes***, 463 U.S. 745 (1983). A defendant may be able to establish constitutionally inadequate performance, however, by demonstrating that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker. ***Mayo v. Henderson***, 13 F.3d 528, 533 (2d Cir. 1994). Essentially, the procedure for resolving that question is that outlined in ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1985):

> "When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome."

Prior appellate counsel, in their Brief to the Ohio Court of Appeals, made two sentence-related arguments. (A third assignment of error related to the application of bond money to fines and costs.) The sum of counsel's argument was that while the ***Foster*** remedy "gave Trial Courts [sic] the ability to sentence at any level, maximum sentence, consecutive sentence or both, without stating reasons," Dr. Ahmed's

resulting 45-year sentence, "violates the Eighth Amendment" and constituted "an 'exceptional sentence' based upon facts neither admitted nor found by a jury." Brief at 11.

These arguments represent a complete misreading of ***Blakely*** and its progeny. An "exceptional sentence" under ***Blakely*** is one in which the trial court employs judicial fact-finding to impose additional prison time, over and above what the jury verdict would allow. ***Foster*** permitted trial courts to impose maximum penalties without any fact-finding. Whether this is good policy might be subject to debate, but there is nothing in this Court's cases which suggest that this is constitutionally impermissible, let alone that it is an "exceptional sentence" under ***Blakely.***

Moreover, the arguments are wholly at odds with prevailing Eighth Amendment jurisprudence, which limits consideration of that issue to single sentences, as opposed to the effect of sentences for multiple offenses. ***United States v. Aiello***, 864 F.2d 257, 265 (2d Cir. 1988) ("Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence"); ***Pearson v. Ramos*** , 237 F.3d 881, 886 (7th Cir. 2001) ("every sentence * * * must be treated separately, not cumulatively, for purposes of determining whether it is cruel and unusual.")

To a large extent, this Court's resolution of the first argument raised in support of granting *certiorari* is outcome-determinative for the second argument: if this Court concludes that the retroactive application of the ***Foster*** remedy violates the due process rights of

Dr. Ahmed, then it necessarily follows that prior appellate counsel was ineffective in not asserting that argument, and instead relying on "issues that were clearly and significantly weaker." ***Gray v. Greer, supra.*** It is respectfully submitted that just such a conclusion is warranted in this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Court should grant the Petition for Certiorari.

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